THE UNDER SECRETARY OF LABOR

WASHINGTON, D. C.
20210

In the Matter of the Confederated Salish and Kootenai Tribes of the Flathead Reservation	Case Nos. 82-CTA-107 82-CTA-235

DECISION AND ORDER

This matter arises under the Comprehensive Employment and Training Act (CETA) of 1973, Pub. L. 93-203, as amended in 1978, Pub. L. 95-524, 92 Stat 1909, 29 U.S.C. § 801 ste q ; and the regulations issued thereunder found at 20 C.F.R. § 675 et seq. and 29 C.F.R. § 95 et seq. It was heard by Administrative Law Judge (ALJ) Charles P. Rippey on August 3 and 4, 1982. The Grant Officer requested that the ALJ's Decision and Order of June 13, 1983 be modified. I asserted jurisdiction in this matter on July 13, 1983. Briefs were submitted by both parties.

The ALJ's Order regarding the issue of Respondent bearing the burden of proof at the hearing is adopted, as is his ruling that the parties are bound by the procedural law in effect at the time of the decision. See Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974).

I also adopt his ruling with regard to my authority to recover misspent funds. Mt. Sinai Hospital of Gr. Miami Inc. v. Weinberger, 517 F.2d 329 (5th Cir. 1975), cert. denied 425 U.S. 935 (1976). The decision with regard to the amount

of such funds to be recovered from the Respondent is likewise adopted, though the reason for that ruling is vacated.

Title III of the Act specifically indicates that funds under that title are .to be used by the Secretary to provide additional services to those segments of the population that are in particular need of them. CETA, § 301.

BACKGROUND

The Respondent, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, hereinafter called the "Tribes", was a grantee of CETA Title III funds during Fiscal Years (FY) 1975-76 and FY 1977-78. The Tribes were also grantees of funds under CETA Titles II and VI but the expenditure of those monies is not at question in this matter. Certain expenditures under both Title III grants awarded to Respondent were disallowed by the Grant Officer after an audit revealed that non-Indians were enrolled-in positions supported by Title III funds.

The AL3 reversed the Grant Officer's disallowance of these funds.

DISCUSSION

I. Is the enrollment of only Indians in CETA Title III, section 302 programs, mandatory or permissive?

The ALJ's Decision and Order was based on his finding that § 302(a) of the law[1/] was ambiguous. Section 302 (a) deals

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[1/] CETA, Pub. L. 93-203, and which was unchanged by the Amendments in 1978, (Pub. L. 95-524).

with programs to assist members of "Indian and Native American communities," and the relevant regulation concerning participation in Title III programs at 29 C.F.R. § 132(a)(i). The ALJ' held that the- requirement that only Indians and Native Americans. can be enrolled in Title III Indian Manpower (as termed in the 1973 Act) or Indian Employment and Training (as termed in the 1978 Amendments) programs was permissive and not mandatory. This is incorrect.

Congress' intention that Title III funds be earmarked solely for programs to benefit Indian and Native American employment and training programs is clear.[2/] The House Committee Report in 1973 addresses the extraordinarily high unemployment of Indians and Native Americans on and off the reservation.[3/] That this specific target group was to benefit from the Title.111 legislation is underscored by Congress establishing the level of funding to be set aside for these programs in the same ratio that the total number of Indian and Native American poor bore

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[2/] H.R. Rep. No. 93-659, 93d Cong., 1st Sess. reprinted in (1973) U.S. Code Cong. & Ad. News, p. 2935 at p. 2948; S. Conf. Rep. No. 93-636, 93d Cong., 1st Sess. reprinted in (1973) U.S. Code Cong. & Ad. News p. 2970 at p. 2981; and S. Rep. No. 95-891, 95th Cong., 2d Sess. reprinted in (1978) U.S. Code Cong. & Ad. News p. 4480 at p. 4487, and p. 4513.

[3/] H.R. Rep. 93-659, supra. at p. 2948. "... The provisions earmarking funds for Indians in this bill are intended to increase substantially the level for Indian manpower programs to serve one million Indians in the Nation, and to assure participation for Indians regardless of where they reside. . .."

to the total number of poor in the United States.[4/] To permit the participation of any other persons, albeit otherwise eligible, would vitiate Congress' intention to insure specific funding levels to benefit the designated Indian beneficiaries.

I am not unmindful of the irony of the matter before me. The grantee is an Indian organization whose members were to be the beneficiaries of the exclusive participation requirements of the legislation. The Tribes' failure to limit participation in Title III funded slots to Indians was in error. The Tribes had other CETA Title II and VI funds to support positions to be filled by the economically eligible non-Indian residents in their service delivery area. These other programs could have served the non-Indian population.

The reliance by the ALJ on the phrases in the statutes, "members of the Indian and Alaskan native communities" in the 1973 law,[5/] and "members of the Native American Indian,

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[4/] S. Conf. Rep. No. 93-636, supra, at 2981
See also, 40 Fed. Reg. 47722 (1975) "Comments, 'In § 97.103 Definitions the definition of *Area of substantial unemployment" is amended to show that the unemployment defined is among Indians only and does not apply to non-Indians in the affected areas.'"

The definition is: "'Area of substantial unemployment' shall mean an Indian reservation with a rate of unemployment among Indians of at least 6.5 percent for a period of 3 consecutive months" (emphasis supplied).

[5/] Pub. L. 93-203 § 302(a)

Alaskan Native, and Hawaiian native communities"[6] in the 1978 Amendments, to include all of the possibly eligible members of a geographic community does not square with another section of the title. Section 301(a)[7] provides that: "[t]he Secretary shall use funds available under this title [III] to provide additional manpower services as authorized under titles I and II to segments of the population that are in particular need of such services" (emphasis supplied).

I am not persuaded that Congress intended that the word "community" was to include within its meaning all persons residing within Indian communities or reservations rather than a generic referral of all Indians living within the United States. To do so would be to dilute the result of guaranteeing minimal levels of Indian participation in Title III programs.

I am also not persuaded that the language of the regulations concerning participation in the Title XII programs should be construed as being permissive. "Indians ... may participate"[8] does not mean "participants may be Indians."

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[6] Pub. L. 95-524 § 302(a)

[7] Pub. L. 93-203

[8] 29 C.F.R. § 97.132(a)(i) "An Indian or other person of native American descent who is economically disadvantaged, unemployed, or underemployed may participate in a program offered by the prime sponsor provided persons have their residence within the area covered by the prime sponsor's comprehensive plan."

Other regulations using the imperative voice unequivocally establish participant eligibility[9/] while the language of the Title III regulation uses the passive voice. There is no question, however, that each regulation when read in the context of the underlying legislation limits participation to a specific beneficiary group.

This decision rejects the position of the ALJ in the Decision and Order in the matter of The Matlakatla Tribe, Case No. 81-CTA-268 (1983), which found that participation of non-Indians in Title III programs was permitted. This decision establishes the rule that exclusive enrollment and participation in Title III programs is limited to members of the specifically designated beneficiary group.

II. Must--the Secretary show special consideration in his dealings with Indians and other Native Americans?

Had the Respondent not been a confederation of Indian tribes granted funds under the Title III programs, the Grant Officer's decision to recover the misapplied funds would be sustained. Only Indians and other Native Americans can be lawfully enrolled in Title III Indian employment and training programs. However, a special obligation exists between the Federal Government and

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9/ Cf. 29 C.F.R. § 97.1109(a)(i) "In order to participate an individual must ... be an Indian."
(A CETA Youth Program regulation that specifically restricts participation to Indian youth)

American Indians. The judicial recognition of this special relationship reaches back into the earliest days of the Republic. (See Cherokee v. Georgia, 30 U.S. 1, (1831)). Throughout our country's history, Congress has acknowledged and the Courts have upheld the special consideration to be given to Indians in their dealings with the Government. (See Morton v. Mancari, 417 U.S. 535 (1974)).

Congress recognized the special relationship that the Federal government has with Indian tribes even in the enactment of the Nation's civil rights legislation.[10/]

The Department of Labor has likewise recognized this special relationship through the Equal Employment Opportunity regulations it promulgated.[11/]

[10/] See Civil Rights Act of 1964, Pub. L. 88-352

"Sec. 703(i)
Nothing contained in this title shall apply to any business or enterprise on or near an Indian resesvation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian on or near a reservation." and

"Sec. 701(b)
The term 'employer' means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof. ..."

[11/] See 41 C.F.R. 60-1.5(a)(6) (1983)
"Work on or near Indian reservations. It shall not be a violation of the equal opportunity clause for a construction or non-construction contractor to extend a publicly announced preference

Congress explicitly restated its concerns and imposed specific obligations on me as Secretary in the administration of the Title III Indian programs.

Section 302 of the CETA of 1973, states in part:

> "(b) The Congress therefore declares that, because of the special relationship between the Federal Government and most of those to be served by the provisions of this section, (1) such programs can best be administered at the national level. ...
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> . . . .
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> "(e) The Secretary is directed to take appropriate action to establish administrative procedures and machinery (including personnel having particular competence in this field) for the administration of Indian manpower programs authorized under this Act. ...
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> . . . .
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> "(h) No provision of this section shall abrogate in any way the trust responsibilities of the Federal Government to Indian bands or tribes."

The 1978 Amendments, Pub. L. 95-524 at § 302 reasserted the same commitments, substituting only "Native Americans" for "Indians," "employment and training" for "manpower," and the addition of Hawaiian natives to the groups specified to be served.

11/ (continued)
in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word 'near' would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter. ..."

In addition to the language pertaining to the administration of Native American Programs, the Senate Report on the 1978 Amendments[12] discussed the Secretary's role with regard to all of the CETA programs. The Report stated:

> "[T]he Secretary's role . .. should not be limited to obligating funds, interpreting the Act through regulations, and monitoring and enforcing compliance with the legal obligations of the Act and the regulations. ...
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> .. .
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> "The Secretary ... has an overall programmatic responsibility to assist prime sponsors. .. in conducting their programs with efficiency and effectiveness with a view to the long term employment and training needs of the Nation."

The Congressional prescription of active involvement in conjunction with the statements of responsibility toward Indians specifically set forth in Title III precludes administrative passivity by the Department when it should be aware of a situation going awry.[13] The Tribes have put into evidence the quarterly reports they submitted[14] that clearly show non-Indians being enrolled in its Title III program. The Grant Officer's witness, who was the regional staff person responsible for receiving

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[12] S. Rep. No. 95-891, supra, at p. 4506.

[13] Cf. 20 C.F.R. § 688.129(c). (This section mandates that DINAP shall provide assistance to Mative American grantees with regard to fraud and abuse. While the matter before us 'is not one of fraud, a review of the quarterly reports would have uncovered the enrollment problem in a timely manner.)

[14] Case No. 82 CTA 107. Respondent's Exhibits Volume I, pp I-T 4.1, 4.2 4.3, 4.4. Case No. 82 CTA 235, Respondent's Exhibits, Volume II, pp II-T 4.1, 4.2, 4.3, 4.4.

and forwarding the reports to the national. office in Washington, testified that all he did was check the reports for arithmetic correctness.[15/] Presumably no one at the Division of Indian and Native American Programs (DINAP) in Washington reviewed the Tribes' reports either, or if they did, they did not advise the Tribes that they were out of compliance.

The first indication that the Tribes had that their enrollment practices were questionable was at the auditor's exit interview on July 25, 1978.[16/] By that time-the disputed enrollment activities of the FY 1975-76 grant were-over, and a substantial part of the FY 1977-78 grant program was completed. The Tribes' grant administrators attempted to switch the employment funding from Title III to Titles 11 and VI for some of the non-Indian participants, but could not changeover all of the ineligible Title III participants at that late date.

The Tribes contend that the provisions of their grant, and specifically the incorporation therein of Title VI of the Civil Rights Act, made it unlawful for them to exclude any persons for reason of race from the program. Preferential employment practices have been deemed to be lawful when necessary to advance the legislation% intent to overcome the profound economic disadvantage of certain groups in society. (See Morton v. Mancari, supra.)

[15/] Hearing Transcript at p. 256.

[16/] Hearing Transcript at pp. 296-300.

An opinion from the Office of the Solicitor[17] that addressed the permissibility of Indian-only enrollment in Title III programs is in the case files. The Tribes' quarterly program reports clearly showed non-Indiansenrolled in Title III programs, but DINAP did not react to this information or advise the Tribes in a timely fashion. When the question of ineligible participants first surface? at she end of the first audit visit there appears to be little of a conciliatory effort on the part of the agency to informally resolve the issue. The case file is replete with requests by the Tribes for informal meetings, and a notable lack of response from the agency.

It is difficult to imagine a situation as unique as the one before me. The Tribes, believing that they could not use Title III funds solely to benefit Indians, enrolled non-Indians in a program that should have been reserved for Indians. However, they did not in any way attempt to hide or manipulate the records of their hiring of non-Indians under the Title III program. The reports they sent to the agency clearly indicated that non-Indians were enrolled in the programs.

Under other circumstances it would be unreasonable to hold that the Government must respond in a timely fashion and indeed

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17/ OCR Regional Bulletin 4-82, dated January 21, 1982, Subject: CETA Title III, Section 302 Program, transmitting the letter of William H. DuRoss III, Associate Solicitor for Employment and Training to Mr. Robert Roche, CETA Program Director; dated January 6, 1982.

uncover each act of misfeasance or malfeasance by a grantee or be estopped from prosecuting its rights. There are too many grantees and too many reports to review to permit an automatic condonation and nonrecoupment for misspent funds, regardless of the grantee's good intentions. However, in our Nation's history, we recognize a responsibility in dealing with American Indians and other Native Americans that transcends the usual arm's length dealings. This special relationship was embodied in the CETA legislation (See Pub. L. 93-203 at § 302 (e) and (h) quoted above), and guides our decision today.

I am also guided by the opinion of the U.S. Court of Appeals, Ninth Circuit in its decision on the Quechan Indian Tribe matter.[18/] In Quechan, the Court remanded the matter to me to consider all of the equities in making an explicit determination that almost eighty percent of the grant funds were to be recouped. The Grant Officer in that matter disclaimed any charges of fraud and the ALJ concluded that Quechan had spent the grant funds on the programs for which they were intended. What also occurred was the failure of the grantee to safeguard the project's enrollment records and thus Quechan could not substantiate the eligibility of the programs' participants. The recoupment sanction for a large percentage of the total grants' awards appeared to be punitive rather than the prudent management of public funds. The Court also took notice of the apparent

[18/] Quechan Indian Tribe v. U.S. Department of Labor, 723 F.2d 733 (9th Cir. 1984)

lack of aggressive management of the grant by the Department's program administration staff in light of the continued failure by Quechan to respond to numerous requests for required reports.

There are certain parallels in the matter presently before me.

The removal of the non-Indians from their Title III positions and their enrollment in positions funded by the other titles of the Act could have been accomplished had DINAP given notice by responding to the information in the quarterly reports which had been timely filed. Adjusting the documentation at this time to correct a misapplication of funds is unnecessary. It is clear that eligible Indians and non-Indians were served and employed under the auspices of the CETA program and in accordance with the general intentions of the Act. The coalescence of the agency's failure to meet its statutory prescriptions and the Tribes' inappropriate bookkeeping assignments of enrollees does not obscure the fact that the intent of the legislation was satisfied. It is in this spirit that the order of the ALJ is adopted but the supporting rationale for his decision as set forth in his Decision and Order is vacated.

Under[redacted]ary of Labor

Dated: NOV 29 1984
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Confederated Salish and Kootenai Tribes of the Flathead Reservation

Case No.: 82-CTA-107, 82-CTA-235

Document: Decision and Order

This is to certify that on November 29, 1984 a copy of the above-captioned document was mailed to the following persons.

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